No. 83 (and 308)

Brief of Ellis for P. E.

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Supreme Court of the United States.

October Term, 1898, No. 310.

THE OHIO OIL COMPANY,
Plaintiff in Error,

vs.

THE STATE OF INDIANA, FOR THE USE OF MADISON COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

ARGUMENT FOR PLAINTIFF IN ERROR.

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APPEAL PRINTING CO., 14 Vesey Street, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 310.

THE OHIO OIL COMPANY,
Plaintiff in Error,

vs.

THE STATE OF INDIANA, for the use of Madison County.

In Error to the Supreme Court of the State of Indiana.

BRIEF FOR THE PLAINTIFF IN ERROR.

Abstract.

On the 16th day of August, 1897, the State of Indiana for the use of Madison County in the said State, commenced this suit in the Circuit Court of the said County of Madison, to recover from the Ohio Oil Company, the plaintiff in error, the sum of $200. and costs, for violation of the provisions of the Act of Legislature of the State of Indiana, approved March 4th, 1893. The portions of said act most necessary to be considered

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in a determination of the question involved in this suit are sections one and three, which are as follows:

"Section 1 Be it enacted by the General Assembly of the State of Indiana, that it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well pipes or other safe and proper receptacles."

"Section 3. Any person or corporation violating any of the provisions of this act shall be liable to a penalty of two hundred dollars for each and every such violation, and to the further penalty of two hundred dollars for each ten days during which said violation shall continue; and all such penalties shall be recoverable in a civil action or actions in the name of the State of Indiana, for the use of the county in which such well shall be located, together with reasonable attorneys' fees and costs of suit."

The complaint alleges that the Ohio Oil Company, a corporation doing business in Madison County, State of Indiana, had in its possession and control an oil and gas well on certain real estate in said county described, on the 24th day of July, A. D. 1897, and on that day drilled and completed said well, and found oil and gas therein, and did unlawfully allow and permit the flow of gas in great quantities to escape from said oil well under its management and control, and after that day made no effort to confine said gas within the said well or in the proper pipes and tanks and safe receptacles, but permitted the same to flow from the said well and escape into the open air for more

than two days after oil and gas were struck in the same.

On the 2d day of April. 1898, the defendant filed a demurrer to plaintiff's complaint aforesaid, averring that the same did not state facts sufficient to constitute a cause of action. The said Circuit Court overruled the said demurrer and thereupon the plaintiff in error filed its answer to the complaint. In the answer the said act of March 4th, 1893 is set out in full. (See Record pages 4, 5 & 6).

The answer also set out in substance as follows: That at the commencement of the said action it had in good faith been and then was engaged in the business of producing oil by drilling therefor in the earth and rock in the said County of Madison; that in its said business it had expended many thousands of dollars in leasing, drilling, purchasing machinery and equipping the same, and in the drilling of a number of oil wells, and for pipes and pipe lines, all of which it then owned and still owned at the time of the commencement of the suit. It admitted that it had drilled the well complained of, but averred that it was drilled in good faith and for the sole purpose of producing oil therefrom, it not being engaged in the business of producing or transporting gas, and having no plant for that purpose, and that such gas was only of value to it for the purpose of aiding in the production of oil. That the well was not drilled in or near any village, town or city, but in the country, and was so constructed and operated as not to injure life or property; that when said well was drilled and completed oil was found therein in paying quantities, and the defendant saved and utilized the same, paying the land owner the stipulated royalty and so operated the same with the approbation and consent of the land-owner,and was so operating the same at the time this suit was

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brought. That the operations aforesaid were carried on by virtue of a written lease to the defendant by the owner of the land made and executed before the well was drilled and that under the said lease it owned and still owns all the oil and gas in said well and in and under the land in the complaint described, and that the said well and lease are and were of great value. That in said well and in the same strata of rock whence the oil was produced, there was also found at the same time, quantities of natural gas, which by its own pressure escaped through pipes in said oil well, being the same as those through which the oil was produced and saved, and that in producing and saving such oil the defendant utilized such gas as a power, force and agency to raise the said oil from the rock-bearing strata below the surface of the ground, such being the usual, natural and ordinary method of raising the same in such cases.

The defendant also averred in said answer that no machinery or process of any kind has ever by the highest skill been devised or known to the world whereby in such a case the oil in such well can be produced and saved, unless at the same time such natural gas as may be in such well is suffered to escape into the air. That if such gas should be shut in to such well, it would be impossible to raise or produce the oil from the well, and that if such course is pursued the business of the said oil company together with its said plant and property would be entirely destroyed, and that the oil and property so destroyed was of much greater value than the gas in the said well, and that with the most approved machinery and appliances known to the world, and with the employes of the highest skill, no more gas was suffered to escape from said well than was consistent with the operation of the same.

The plaintiff in error also averred in its answer that the said act of the General Assembly of the State of Indiana set out therein, violates the Fourteenth Amendment of the Constitution of the United States, under the facts set out in the answer, in that it deprives it and other oil operators similarly situated, of liberty and property without due process of law, and denies to it and others similarly situated, the equal protection of the laws.

The State of Indiana demurred to the answer aforesaid upon the ground that the same did not state facts sufficient to constitute a defence. The said Circuit Court of Madison County sustained the demurrer and final judgment was rendered against the plaintiff in error for the sum of $400., as damages and $100., for attorneys' fees and also all costs and charges.

The plaintiff in error appealed from said judgment to the Supreme Court of the State of Indiana, alleging manifest error in that the Circuit Court erred in sustaining the demurrer to its answer. On the 21st day of April, 1898, the Supreme Court of the State of Indiana affirmed the judgment of the said Circuit Court and the suit was decided adversely to the plaintiff in error, in the said Supreme Court of Indiana. (See Record page 10).

From this decision of the Supreme Court of Indiana the plaintiff in error filed its petition for a writ of error to the Supreme Court of the United States, and writ of error was granted by the Chief Justice of the Supreme Court of Indiana, the Hon. Timothy E. Howard on the 28th day of April, 1898. (See Record page 29).

Thereafter citations were duly issued and acknowledgment of service had and bond executed, duly approved by the Chief Justice of the said Supreme Court of Indiana.

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Errors Assigned.

The errors assigned in this Court are as follows:

"1. The circuit Court of Madison County erred in overruling the demurrer to the first paragraph of the complaint.

2. The Circuit Court of Madison County erred in overruling the demurrer to the second paragraph of the complaint.

3. The Circuit Court of Madison County erred in sustaining the demurrer to the answer.

4. The Supreme Court of Indiana erred in deciding that the Circuit Court of Madison County committed no error in overruling the demurrer to the first paragraph of the complaint.

5. The Supreme Court of Indiana erred in deciding that the Circuit Court of Madison County committed no error in overruling the demurrer to the second paragraph of the complaint.

6. The Supreme Court of Indiana erred in deciding that the Circuit Court of Madison County committed no error in sustaining the demurrer to the answer.

7. The Supreme Court of Indiana erred in deciding that the act of the Legislature of Indiana approved March 4, 1893, was not in violation of the 14th Amendment to the Constitution of the United States, and erred in deciding that said Act of said Legislature did not operate to deprive said The Ohio Oil Company of liberty and property without due process of law.

For all of which errors said The Ohio Oil Company prays that said judgment be in all things reversed.

Argument.

As already appears, the suit was brought against the Ohio Oil Company to recover the penalty im-

posed for the violation of Section 1 of the Act of the General Assembly of the State of Indiana approved March 4th, 1893. The plaintiff in error contends that said section of said Act as construed by the Supreme Court of the State of Indiana in sustaining the demurrer to its answer, in this suit, deprives it of its property and is therefore in violation of the Fourteenth Amendment of the Constitution of the United States. Even if it be conceded that under certain conditions the act might be upheld, it cannot be enforced against the Ohio Oil Company under the facts stated in said answer without violating said amendment of the Constitution of the United States. In the answer it is stated that the Ohio Oil Company procured a written lease for oil and gas purposes from the owner of the land described in the complaint, and by the terms thereof became the owner of all the oil and gas in and under the said land, with the exclusive right to operate for and produce the same. That it entered upon said premises under its lease with the approval of the owner of the land and commenced and completed at great expense, a well thereon for the purpose of obtaining and producing oil therefrom. That it is a corporation engaged in the business of producing oil; that oil in paying quantities was found in said well; that oil and gas are found in said premises in the same strata and that some gas escaped from the said well with the oil; that the oil produced from said well is much more valuable than the gas which escaped therefrom; that it is impossible to produce oil from said well without allowing gas to escape with it.

That the well was drilled in such a locality that no injury was or could be done to the public or an individual by the escaping gas; therefore if the plaintiff in error is compelled in accordance with the provisions of said statute to shut in the gas in

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said well and prevent it from escaping therefrom, the oil well and the oil lease of said premises will thereby be rendered valueless, and the property of the oil company therein be destroyed.

Oil and gas in place are part of the realty and belong to the owner of the land in which they are contained.

The decision of the Supreme Court of Indiana as appears by its opinion, is based upon the proposition that the owner of land has no property in the oil and gas therein until the same has been brought to the surface and confined. If this proposition is not true, then the reasons given by the Court for its decision in sustaining the demurrer to the answer, entirely fail and the conclusion reached must be held to be erroneous. It is true that Courts other than the Supreme Court of Indiana, unfamiliar with the oil and gas business, have heretofore made serious mistakes in reference to the character of these minerals, and the application of legal principles to conveyances of and operations to obtain them, but no other Court has gone so far as to hold that the owner of the land in fee is not also the owner of the oil and gas contained therein.

Pennsylvania Cases.

"A guardian has ordinarily power to lease any of his ward's property of such character as makes it the subject of a lease; but without the approval of the Orphans' Court he cannot dispose of any part of the realty. Oil is a mineral, and being a mineral, is a part of the realty, and a guardian cannot lease the land of his ward for the purpose of its developement, as it would in effect be the grant of a part of the corpus of the estate of his ward."

Appeal of Stoughton, e al., 88 P. S., 198.

Speaking of the character of the oil in the above case, the Supreme Court said:

> "Oil, however, is a mineral, and being a mineral, is part of the realty." Funk v. Haldeman, 3 P. F. Smith, (53 P. S., 229).
>
> "In this it is like coal or any other mineral product which in situ forms part of the land. It may become, by severance, personality, or there may be a right to use or take it originating in custom or prescription, as the right of a life tenant to work open mines, or to use timber for repairing buildings or fences on a farm, or for firebote. Nevertheless, when conveyance is made of it, whether that conveyance be called a lease or deed, it is, in effect, the grant of a part of the corpus of the estate and not of a mere incorporeal right. In the case above cited this is said to be so as to leases of coal lands for the purpose of mining, and there is no reason why the same should not apply to oil leases."

In the case of Gill v. Weston, 110 P. S., 312, the Supreme Court held as follows:

> "Petroleum is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands."

It became a question in this case whether a mortgage given by a lessee of certain lands for oil purposes would be a valid mortgage upon his leasehold interest under an Act of the Legislature of Pennsylvania authorizing the mortgaging of leasehold interests in mining properties.

The Court in this case, referring to the Act and the character of oil, say:

> "It matters not that the Act of 1855 was passed before petroleum was discovered. It is a mineral substance obtained from the

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> earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands. The Act in express terms makes it lawful for the lessee of a term of years of mining lands to mortgage the same."

In the opinion in the case of Brown v. Beecher, 120 P. S , 590, the Court say, on page 603:

> "The contract referred to was a lease of the lands for a specified term, and for a particular purpose, at a fixed rent or royalty reserved out of the production. As to the legal force and effect of this writing there can, we think, be no doubt. It conveyed an interest in the land; in this respect it is distinguished from a license. It is similar to the lease in Stoughton's Appeal, 88 P. S., 198, but the lease in that case was executed by a guardian, and it was held, that although a guardian might lease his ward's land from year to year in the usual form for ordinary purposes, he could not, without the decree of the Orphans' Court, bind his ward by a lease of the land for oil purposes for twenty-one years, for that was practically the sale of the oil."

In the case of Wettengell v. Gormley, 160 P. S., 559, the Court, in discussing the character of the agreement, which was an ordinary oil lease, said:

> "But this was not an agricultural lease, it was an agreement known as an oil lease; it conferred an exclusive right upon the tenant to take the oil that might underlie the whole six hundred acres, and gave him fifteen years within which to take it. It was in legal effect a sale of the oil, for the removal of which the surface and the subsurface were subject to the necessary servitudes."
>
> "An oil lease, investing the lessee with the right to remove all the oil in place in

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> the premises in consideration of his giving the lessors a certain percentum thereof, is in legal effect a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises."

Blakely, et al. vs. Marshall, 174 P. S., 425.

> "As was held in Stoughton's Appeal, 88 Pa., 201, and other cases in same line, oil in place is a mineral, and being a mineral it is part of the realty. An oil lease, investing the lessee with the right to remove all the oil in place, in the premises, in consideration of his giving the lessors a certain per centum thereof, is in legal effect a sale of a portion of the land and the proceeds represent the respective interests of the lessors in the premises."

(From opinion; Blakely et al. vs. Marshall, 174 P. S., 429).

In Chicago, &c. O. & M. Co. vs. U. S. Petroleum Co., 57 Pa., 83, an agreement to lease land for a term of years with exclusive right to bore for and collect oil, was held to pass a corporeal interest.

Bryan's Law of Petroleum & Nat'l Gas, page 24.

Ohio Case.

In a very recent case decided by the Supreme Court of Ohio, to be found in 57 O. St. Rep., 317, Kelly v. The Ohio Oil Company, the syllabus is as follows:

> "Petroleum oil is a mineral, and while it is in the earth, it forms a part of the realty; and when it reaches a well and is produced on the surface, it becomes personal property, and belongs to the owner of the well."

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"2. Whether such oil percolates through the rock, or exists in pools or deposits, it forms a part of that tract of real estate in which it tarries for the time being; and when it leaves one tract and enters another, it becomes a part of the realty of the latter, and thereby the owner of the former, loses all right to the oil while it remains away from his land."

New York Case.

In the case of Hughes v. United Pipe Lines, reported in 119 N. Y. C't. of Ap. Rep., 423, the syllabus is, in part, as follows:

"Oil in the earth belongs to the owner of the land and when unlawfully taken therefrom by a wrongdoer the title of such owner remains perfect and he may pursue and reclaim the property wherever he may find it."

West Virginia Cases.

"Oil in place among the strata of the earth is a part of the inheritance; an unlawful removal thereof is a disherison of him in remainder, constituting waste, which will be enjoined by a Court of equity."

Williamson v. Jones, 39 W. Va., 231.

"1. Oil—Realty.

Petroleum oil as it is found in the cavities of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word "land."

4. An oil lease, investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain per cent. thereof, is, in legal effect, a sale of a portion of the land,

and the proceeds represent the respective interests of the lessors in the premises."

Wilson et al. v. Youst et al., 43 West Va., 826.

"1. The appointment of a committee of an insane person by the County Court or its clerk, without the notice required by statute, is void."

3. Oil and gas being a part of the realty in and under which they exist, the committee of an insane person having an interest therein can only sell or lease such interest by decree of Court as provided by statute."

South Penn. Oil Co. v. McIntire, et al., 44 W. Va., 296.

Cases in the United States Courts.

In Barker v. Dale, U. S. Cir. Ct. W. Dist. Pa., 3 Pitts. Law J., 190 (170), the lease was for the sole and only purpose of mining and excavating for petroleum, coal, rock or carbon oil, under the lessee and his heirs, &c., for 25 years in consideration of 1/2 of the oil found. Held; per McKennen, Cir. J., that by the lease the corporeal interest in the business therein described was vested in the plaintiff which as a proper subject of ejectment.

In the case of Brown v. Spilman, 155 U. S. Sup. Ct. Rep., 669/70, Mr. Justice Shiras speaking for this Court said: "Petroleum and gas are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under

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another's control, the title of the former owner is gone."

Oil and gas have been produced in the State of Pennsylvania in large quantities for nearly forty years, and the question which we are discussing is so well settled in that State that absolute grants of oil and gas in and under tracts of land are taxed separately from the surface under the provision of a statute of that State which authorizes the taxation of minerals separate from the surface.

Oil and gas in lands are there sold and transferred as land and such conveyances have been repeatedly held to be within the recording acts which relate only to conveyances of interests in real estate. It would seem therefore that if there is anything in authority, the rule is well settled that oil and gas in place are a part of the realty and belong to the owner of the land in which they are contained.

The Supreme Court of Indiana in determining this case and one or two others of a similar character, relied principally upon a statement contained in the opinion of the Supreme Court of Pennsylvania in the case of the Gas Company vs. De Witt, 130 Pa. St , 235, as follows:

> "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner."
>
> Extract from opinion, page 249.

This statement is the mere dicta of the Judge delivering the opinion of the Court and had nothing whatever to do in determining the case. The principal question with which the Supreme Court

of Pennsylvania had to deal in that case was whether the plaintiff in the suit in equity, was in possession of the gas in and under the entire tract of land. The plaintiff had obtained a lease from the owner of the land, one of the defendants, for oil and gas purposes; had drilled a well and obtained gas, and the Court held that he, by the drilling of such well upon the property, was in possession of all the gas in and under the premises and had a right to a decree restraining the owner of the land from drilling upon the portion where the terms of the lease no wells were to be drilled. It was contended by the defendants, that the lessee was not in possession of all the gas in the land covered by the lease and therefore the bill in equity should be dismissed and the plaintiff remitted to his action at law to determine his right to the gas in the portion of the tract of land upon which no wells were to be drilled. That there was no intention on the part of the Court in determining the rights of the parties in that case to hold that oil and gas are not a part of the realty, and that the owner of the land has no property in them until raised to the surface, is manifest by the decision itself, and it is also abundantly shown by the decisions of the Supreme Court of Pennsylvania rendered since that time and hereinbefore cited. We call attention especially to the cases of

Wettengell vs. Gormley, 160 Pa. St., 559.
Blakely et al. v. Marshall, 174 Pa. St., 425.

So well settled was the rule, even at the time the case of Gas Co. v. DeWitt was decided, that the judge delivering the opinion states the following proposition:

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> "They (oil and gas) belong to the owner of the land and are part of it so long as they are on or in it and are subject to his control."

If they are part of the land and belong to the owner thereof, he has an unqualified property in them.

We submit that there is not the slightest analogy between wild animals or fish in public streams, and oil and gas in place. Oil and gas are found in rocks more or less porous and so far as we know, for ages before being disturded by the drill, are stationary and as much a part of the land as the rocks in which they are contained. Animals and fish change their location of their own volition; oil and gas do not. Game and fish belong to the public; oil and gas to the owner of the land in which they are contained. The public has no interest in the oil and gas in place. It is not even alleged in the complaint in this case that the oil and gas in the land described are not part of the realty and do not belong to the defendant. That the defendant owned the oil and gas found in the gas well referred to in the complaint, is substantially admitted and for the purposes of this particular case, it is likely we have unnecessarily discussed this question There is a case however, pending in this Court which will probably be argued and disposed of in connection with this, in which the State of Indiana is plaintiff, wherein it is alleged that oil and gas are fugitive substances in which alone the public hasproperty until the same is reduced to possession by an individual or company, and it is on account of the allegations contained in that case, principally, that we have undertaken to satisfy the Court that oil and gas in place are part of the realty and belong to the owner of the surface.

If oil and gas are not part of the realty, the owner of the land is the only one who has the right to drill for and obtain them.

If this Court should be of opinion that the position of the Supreme Court of Indiana is correct, that oil and gas in place do not belong to the owner of the land in which they are contained, the decision of that Court is still erroneous and should be reversed. If the owner of the land does not own the oil and gas to be found in and under his land, until he has secured it, it is very clear that he alone has the right to enter upon the land and drill wells to the place where they are deposited. It must also be conceded that he may take through the wells which he drills on his land, all the gas and all the oil he can obtain therefrom, and the Supreme Court of Indiana concedes that when they are raised to the surface in the course of being produced through the wells, he becomes the absolute owner of them. Whether then oil and gas in place are part of the realty and belong to the owner of the land, or he has the exclusive right to drill wells on his land and produce the same, the defendant in this case, the Ohio Oil Company, according to the facts set out in its answer, was at the time this suit was instituted, engaged in a lawful business and making but a reasonable use of its own property for its benefit and profit. The plaintiff is therefore forced to the position that the State of Indiana in its sovereign capacity, has power to prevent the defendant from making such lawful and reasonable use of its property. This is unquestionably the effect of the decision of the Supreme Court of Indiana. The allegations contained in the answer are to be taken as true, and the defendant says

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that it cannot conduct its business of producing oil if it is compelled to shut in the gas which escapes with it, as the Act of 1893, under which this suit is brought, requires. It was engaged in the lawful business of producing oil from its own property and as an incident of the production of oil, the gas contained in the same rock escaped with the oil and was utilized to the extent that it aided in forcing the oil to the surface. The gas was utilized in the business of the defendant as much as it would have been by a manufacturer, if conducted to his establishment and used as fuel. Oil wells which contain little or no gas must be pumped. The defendant had no use for the gas as fuel and no means for using it as fuel, but could use it in the manner described in producing oil from its well, and as is stated in the answer, it could not use this well or any other well it should drill upon this property if it was compelled to shut in and confine the gas.

The practical working of the act of 1893 under which this suit is brought.

The practical working of the Act of 1893 under which this suit is brought, may be easily illustrated. The defendant is engaged in the business of producing oil upon the property described in the complaint, and as stated, uses the gas pressure for the purpose of raising the oil to the surface, and then the gas escapes. This course of conduct is within the prohibition of the said Act. The owner of the adjoining tract of land may be engaged in the manufacturing business and need fuel; he drills a well, obtains oil and gas; he has no difficulty in saving the oil and at the same time using the gas in his manufacturing establishment as fuel. He has not violated the said Act and reaps the full benefit of his property. That a law which

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has this effect is unjust and in violation of the Federal Constitution, we think there can be no question.

Another effect of this Act, if the contention of the plaintiff is true, can be easily presented to show the inequality and injustice inflicted upon different owners of land in the same vicinity.

The State contends that there is a large gas reservoir in Indiana where the defendant's well is located, and that a well drilled on land over and into this reservoir at that point will affect the gas over the entire area of the reservoir. In other words, that a gas well on A's land will draw into it, and there will be produced from it gas that did underlie the adjoining land of B. Assuming this position to be correct, A is engaged in the business of producing oil—he has no means of utilizing the gas except as above stated, to raise his oil to the surface. As he cannot utilize his gas he is compelled to quit business and stop producing oil and gas and close his well. B is engaged in the manufacturing business and needs fuel. He drills a well for the purpose of obtaining gas for fuel. He has no difficulty, as we have above said, in caring for his oil and at the same time conducting his gas to his manufacturing etablishment. A is compelled to quit business and B can continue the production of oil and use the gas in his manufacturing establishment until he has not only used the gas in his own land but has drawn all the gas out from under the land of A. An Act which confessedly produces such a result according to the theory of the plaintiff in reference to the gas, cannot be enforced. We do not desire to be understood however, as conceding the allegation made by the plaintiff in one of its cases against the Ohio Oil Company, pending in this Court, that gas exists in the State of Indiana in large reservoirs or a series of reservoirs and that they are well

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defined, and that gas taken from any part of them affects or reduces the common supply. This theory of the plaintiff is contrary to common knowledge. Experience in all oil and gas fields in the United States has shown that wells very near each other have shown no such effect. Very frequently within a short distance of a good gas or oil well one or more wells are drilled which produce neither oil or gas, and also within a few rods of a good oil or gas well, a smaller or a much larger oil or gas well is obtained. In some localities it is true that a well drilled on one tract of land will affect the pressue of gas in another well on an adjoining tract. It all depends upon the character of the formation in that particular locality. It is but speculation to undertake to determine the condition and situation of the formation from one to three thousand feet below the surface. If the plaintiff's theory in reference to reservoirs of gas is true, it is clear that the Act under consideration operates to the detriment of nearly every land owner within the gas belt, and is only a benefit to the gas companies engaged in transporting and supplying gas to consumers. If the gas is contained in one or more great reservoirs and a well drilled in any part will draw gas from another reservoir, then all that a gas company needs is a lease of a very few tracts of land scattered over the reservoir or reservoirs, and as the gas companies under the Act can compel all persons who drill wells on their land to shut in the gas if they are not able to utilize it in the manner done by the gas companies, they can destroy the value of the gas to every landowner except themselves until they have exhausted the gas in the entire reservoir. If our view is correct, the Act of 1893, should have been entitled "An Act for the Benefit of Gas Companies," and this action instead of being a proceeding in the interest of the citizens

of Indiana, is in the interest of companies producing and marketing gas, and detrimental to the landowners in the oil and gas belt.

If this Court is satisfied, assuming the allegations contained in the answer of the defendant to be true, that it was engaged in the reasonable use of its own property for its own benefit, and that the effect of the Act of 1893 is to prevent it from so using and operating its property, then the Act as applied to the facts in this suit, at least, is in violation of the Fourteenth Amendment of the Constitution of the United States, even though the Court should be satisfied that others may be deprived of some profit which they might make if this statute is enforced.

If the defendant's well produced gas only, a different question might be raised. The requirement of the statute that it should utilize or shut in its gas within two days after the well is completed would not interfere with the conduct of its business. If it was not in a situation or did not care to utilize the gas from the well, but should wantonly permit it to escape into the air without receiving any benefit thereby, we could understand that a different rule might possibly be held.

If the contention of the plaintiff is correct that the gas would be drawn into such well from the adjoining lands, we think that this Act cannot be sustained under any given facts which could exist, but if it could, it does not follow that the decision of the Supreme Court of Indiana in sustaining the demurrer to the defendant's answer, did not thereby deprive the defendant of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

In the case of Scott v. McNeal, 154 U. S., at page 45, this Court said:

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> "The Fourteenth Article of the Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the law.' This prohibition extends to all acts of the State whether through its legislative, its executive or its judicial authorities."

In Chicago, Burlington, &c. R. R. Co. v. Chicago, 166 U. S., 226 233, Justice Harlan said:

> "It is not contended, and it could not be, that the Constitution of Illinois deprives the railroad company of any right secured by the Fourteenth Amendment, for the State Constitution not only declares that no person shall be deprived of his property without due process of law, and that private property shall not be taken or condemned for public use without just compensation. But it must be observed that the prohibitions of the Amendment refer to all instrumentalities of the State, to its legislative, executive and judicial authorities, and therefore whoever, by virtue of public position under a State government deprives another of any right protected by that Amendment against deprivation by the State, violates the Constitutional inhibition; and as he acts, in the name and for the State and is clothed with the State's power, his act is that of the State. This must be so, or as we have often said, the Constitutional Amendment has no meaning, and the State has clothed one of its agents with power to annul or evade it."

> "An Act which deprives a person of the beneficial use of his property deprives him of his property without due process of law."

In re Firmon St., 17 Wendell, 658-660.

See also in re Wall St., 17 Barb., 639-641.
Gilman v. Tucker, 128 N. Y., 190-204.
H. Ins. Co. v. N. Y., 134 U. S., 598.

Police Power.

It is claimed by the plaintiff that the Act of1893 can be sustained under the police power of the State of Indiana.

While we cannot define with absolute certainty that which is known as the "Police Power" of a State, it is well settled by the decisions of this Court and the Courts of many of the States, that it cannot invade the rights guaranteed by the Constitution of the United States. It is also well settled that a legislative declaration as to what is the proper exercise of police power, is not conclusive or binding upon the Courts. It is a judicial question. The determination of what is the proper exercise of the police power by the legislature is subject to the supervision of the Courts.

> "Powers which can only be justified on "that specific ground (that they are police "regulations), and which otherwise would be "clearly prohibited by the Constitution, can "be such only as are so clearly necessary to "the safety, comfort and well-being of "society, and so imperatively required by "the public necessity, as to lead to the "rational and satisfactory conclusion that "the framers of the Constitution could not, "as men of ordinary prudence and fore-"sight, have intended to prohibit their ex-"ercise in the particular case, notwithstand-"ing the language of the prohibition would "otherwise include it."
>
> People v. Jackson & U. P. R. Co., 9 Mich., 285.

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"Definitions of the police power must, "however, be taken subject to the condition "that the State cannot, in its exercise, for "any purpose whatever, encroach upon the "powers of the general government, or "rights granted or secured by the Supreme "law of the land."

N. O. Gas Co. v. Louisiana L. Co., 115 U. S. S. C. Rep., 661.

"The police power of the State to regu- "late the sale of intoxicating liquors and "preserve the public health and morals "does not warrant the enactment of laws "infringing positive provisions of the Con- "stitution of the United States."

Walling v. Mich., 116 U. S. S. C. Rep., 447.

In the course of the opinion in this last case the Court say, on page 460:

"The police power cannot be set up to "control the inhibitions of the Federal Con- "stitution, or the powers of the United States "Government created thereby."

In Mugler v. Kansas, 123 U. S., 661, Harlan, J., says:

"Undoubtedly the State, when providing "by legislation for the protection of the "public health, the public morals or the "public safety, is subject to the paramount "authority of the Constitution of the United "States, and may not violate rights secured "by that instrument."

"While generally it is for the Legislature "to determine what laws are required to "protect and secure the public health, com- "fort and safety, under the guise of police "regulations it may arbitrarily infringe upon "personal property rights; and its determi- "nation as to what is a proper exercise of the

"power is not final or conclusive, but is "subject to the scrutiny of the Courts."

"When, therefore, the Legislature passes "an act ostensibly for the public health, but "which does not relate to, and is inappro- "priate for the purpose, and which destroys "the property or interferes with the rights "of the citizens, it is within the province "of the Courts to determine this fact and "to declare the act violative of the consti- "tutional guaranties of those rights."

In the course of the opinion the Court say:

"What does this act attempt to do? In "form it makes it a crime for a cigarmaker "in New York and Brooklyn, the only "cities in the State having a population ex- "ceeding 500,000, to carry on a perfectly "lawful trade in his own home. Whether "he owns the tenement house or has hired "a room therein for the purpose of prosecut- "ing his trade, he cannot manufacture "therein his own tobacco into cigars for his "own use or sale, and he will become a "criminal for doing that which is perfectly "lawful outside of the two cities named— "everywhere else, so far as we are able to "learn, in the whole world. He must either "abandon the trade by which he earns a "livelihood for himself and family, or, if "able, procure a room elsewhere, or hire "himself out to to one who has a room upon "such terms as, under the fierce competition "of trade and the inexorable laws of supply "and demand, he may be able to obtain "from his employer. He may choose to do "his work where he can have the super- "vision of his family and their help, and "such choice is denied him. He may choose "to work for himself rather than for a task- "master, and he is left without freedom of "choice. He may desire the advantage of "cheap production in consequence of his "cheap rent and family help, and of this

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"he is deprived. In the unceasing strug-
"gle for success and existence which pervades
"all societies of men, he may be deprived
"of that which will enable him to maintain
"his hold and to survive. He may go to a
"tenement house, and, finding no one liv-
"ing, sleeping, cooking or doing any house-
"hold work upon one of the floors, hire a
"room upon such floor to carry on his trade,
"and afterwards some one may commence to
"sleep or to do some household work upon
"such floor, even without his knowledge,
"and he at once becomes a criminal in con-
"sequence of another's act. He may go to
"a tenement house and finding but two fam-
"ilies living therein independently, hire
"a room, and afterwards by subdivision of the
"families, or a change in their mode of life,
"or in some other way, a fourth family be-
"gins to live therein independently, and
"thus he may become a criminal without
"the knowledge or possibly the means of
"knowledge that he has violated any law.
"It is, therefore, plain that this law inter-
"feres with the profitable and free use of his
"property, by the owner or lessee of a tene-
"ment house who is a cigar maker, and
"trammels him in the application of his
"industry and the disposition of his labor,
"and thus, in a strictly legitimate sense, it
"arbitrarily deprives him of his property and
"of some portion of his personal liberty.

"The constitutional guarantee that no
"person shall be deprived of his property
"without due process of law may be vio-
"lated without the physical taking of
"property for public or private use. Prop-
"erty may be destroyed or its value may be
"annihilated; it is owned and kept for some
"useful purpose, and it has no value unless
"it can be used. Its capacity for enjoy-
"ment and adaptability to some use are
"essential characteristics and attributes
"without which property cannot be con-

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> "ceived; and hence any law which destroys "it or its value, or takes away any of its "essential attributes, deprives the owner of "his property."

In People v. Gilson, 109 N. Y., 389-400, Mr. Justice Peckham, says:

> "This brings us to the consideration of "the question whether that act is valid as "a proper exercise of what is, by way of "classification, called the police power of the "State. That power has never yet been "fully described nor its extent plainly lim-"ited, further, at least, than this, it is not "above the Constitution, but it is bounded "by its provisions; and if any liberty or "franchise is expressly protected by any "constitutional provision, it cannot be de-"stroyed by any valid exercise by the Leg-"islature of the police power. The extent "of this power has been the subject of dis-"cussion in this Court, and in the recent "and most important case of *In re* Jacobs "(98 N. Y., 107) the question was examined "and most exhaustively reviewed by Earl, "J., in his opinion. To reopen the subject "would now be useless, and I refer to that "case as authority for the statement that the "Legislature cannot, without reason and "arbitrarily, infringe upon the liberty or "the property rights of any person within "the protection of the Constitution of this "State; and that if the Legislature shall "determine what is proper exercise of its "police power, its decision is subject to the "scrutiny of the Courts."

In Colon v. Lisk, 153 N. Y., 188, the Court of Appeals of New York has recently restated the general rule laid down by the foregoing authorities.

See also:

People v. Marx, 99 N. Y., 377-387.
People v. Arensberg, 103 N. Y., 399.
Foster v. Scott, 136 N. Y., 577-584.

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Whenever the Legislature passes on an act which transcends the limit of the police power, it is the duty of the judiciary to pronounce it invalid and nullify the attempt to invade the people's rights.

Nechamous v. Warden, 144 N. Y., 529-535.

See also:

Health Dept v. Rector, 145 N. Y., 32-39.

"The reasonable enjoyment of one's real "estate is certainly a vested right, which "cannot be interfered with or limited arbi-"trarily. The constitutional guaranty of pro-"tection for all private property extends "equally to the enjoyment and the posses-"sion of lands."

Tideman, Lim. of Police Powers, Sec. 122, page 423.

"In order to lay the foundation of a "claim for compensation for the taking of "property in the exercise of the right of "eminent domain, it is not necessary that "there should be an actual or physical tak-"ing of the land. Whenever the use of the "land is restricted in any way, or some in-"corporeal hereditament is taken away, "which was appurtenant thereto, it consti-"tuted as much a taking as if the land it-"self had been appropriated."

Tideman's Lim. of Police Powers, Sec. 121d, page 397.

Under the guise of police power the Legislature cannot invade the rights of persons and property and a statute, the ostensible object of which is to secure the public welfare or safety, must appear to be adapted to that end.

Rickey v. People, 155 Ill., 98.
People v. Gilson, 109 N. Y., 389.

Calder v. Bull, 3 Dall., 386; 109 Mass., 315.
Cooley's Con. Lim. 6th Ed., 306, 307, 309.

Under the foregoing authorities it is clear to us that this Court should not hold that the Act of 1893 in its effect upon conditions such as appear in this suit, is a proper exercise of the police power. It has the effect of destroying one man's property for the benefit of another and to prevent the owner of land in which oil and gas are contained from operating it for his own benefit in a reasonable and prudent manner. If we are correct in our proposition in reference to the character of oil and gas they belong to the owner of the land in which they are found, and the public has no interest in a proper sense, in the manner in which they shall be used or disposed of by the owner thereof, the simple question of private rights is involved.

Neither the state nor the public can appropriate one ounce of the gas underlying the land in Indiana, and for that, if for no other reason the Legislature of the State cannot enact a law that will operate to allow one landowner to utilize the oil and gas and prevent his neighbor from doing either.

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